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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964.

ROBERT KEITH CARTER,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.
No. 322

BUELL HENLEY,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.
No. .....

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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OPINIONS BELOW.

1. (a) The unofficial reports of the opinions below are these: Opinion of the United States Court of Appeals for the Eighth Circuit: *Robert Keith Carter, Appellant,* v. *United States of America, Appellee,* No. 17254; *Buell Henley Appellant,* v. *United States of America, Appellee,* No. 17259. (May 20, 1964, not yet officially reported); Memorandum

opinion of the Honorable John W. Oliver, Judge of the United States District Court for the Western District of Missouri, Southern Division, overruling defendants' separate motions for new trial (not reported). These opinions are appended hereto as provided in I subparagraph (i) of Rule 23 of this Court.

(b) (i) The date of the judgment sought to be reviewed is May 20, 1964, and the time of its entry is June 29, 1964.

(ii) Motion for rehearing in the above causes was overruled by the United States Court of Appeals for the Eighth Circuit on June 15, 1964. Mandate filed June 29, 1964.

JURISDICTION.

(iii) The statutory provision believed to confer on this Court jurisdiction to review the judgment, decree and opinion of the United States Circuit Court of Appeals for the Eighth Circuit is Title 28, U.S.C., Section 1254.

QUESTIONS PRESENTED.

(c) The questions presented for review (the questions are the same in both of the above cases), are these:

(i) Did the United States Court of Appeals for the Eighth Circuit decide a federal question in a way in conflict with applicable decisions of this Court, and particularly that of *District of Columbia* v. *Armes*, 107 U.S. 519, in affirming a judgment of conviction in a criminal case of the United States District Court for the Western District of Missouri wherein, the District Court admitted, over defendants' objection, the testimony of a government witness against de-

fendants, who "had an unclear memory of events", and whose testimony, in the language of the trial court, "strengthened the government's case."?

(ii) Did the United States Court of Appeals render a decision in conflict with the decision of another Court of Appeals on the same matter?

(iii) Has the Court of Appeals decided an important question of federal law which has not been, but should be settled by this Court in promulgating a new rule of evidence, when the Court of Appeals stated (op. pp. 3, 4): "The effect of appellants' contention here is that the abstruse psychiatric concepts of mental ailment or illness which some courts have recently been accepting as providing a standard for whether an accused is lacking in criminal capacity and responsibility should be made applicable to the witnesses in a criminal case so as to require that their capacity to testify against accused be resolved on the same basis. We have not in this Circuit accepted this loose and unobjective standard as a basis for measuring criminal capacity * * *."

CONSTITUTIONAL PROVISIONS AND REGULATIONS.

(d) The Constitutional provisions, statutes and regulations involved are:

Amendment V of the Amendments to the Constitution of the United States, Amendments 1 and 5, U.S.C.A. Constitution.

Rule 26, Federal Rules of Criminal Procedure, 26 U.S.C.A., p. 444.

(The pertinent text of the above is set forth in an appendix.)

STATEMENT OF THE CASE.

(e) Defendants were convicted in the United States District Court for the Western Division of Missouri of the violation of Title 26, U.S.C., section 4704(a), on charges of purchasing and possession of narcotic drugs not in or from the original stamped package; of selling, and transferring, in violation of U.S.C., section 4705(a), narcotic drugs not in pursuance of a written order form issued by the Secretary of the Treasury; and of conspiring, in violation of 18 U.S.C. to commit the foregoing convictions. A five year sentence was imposed on each conviction as to each defendant, to run concurrently. During the trial of the case, the government, over the objections of defendants, offered in its case against defendants a witness Hines, who had been confined for mental observation in the Springfield Medical Center in a former proceeding against the said Hines. The evidence of the medical experts as to the witness was that Hines *"has an unclear memory of events* particularly concerning his offense which may be due to a partial amnesia as a part of his mental illness." The trial judge, disturbed over the admission of this testimony, finally admitted it. Motions for new trial were filed and overruled by the trial judge in a memorandum opinion appended hereto. The United States Court of Appeals for the Eighth Circuit affirmed, in the opinion here sought to be reviewed and appended hereto. Petitioners, in the court of first instance and in the United States Court of Appeals for the Eighth Circuit urged that the court's action in admitting the suspect evidence, which evidence "strengthened the government's case" was in violation of defendants' rights under Amendment V of the Amendments to the Constitution of the United States, in denying defendants due process of law.

BASIS FOR FEDERAL JURISDICTION.

(g) The statement of the case under (e) above shows the basis for federal jurisdiction in the court of first instance, in that defendants were charged in that court with the violation of the statutes therein set out.

ARGUMENT.

(h) The opinion and decision here sought to be reviewed is in direct conflict with the controlling decision of this Court in *District of Columbia* v. *Armes*, 107 U.S. 519, 522. Therein, *two criteria*, are established both of which must be met to allow the testimony of one whose sanity is suspect, they are:

First, that he have sufficient understanding to apprehend the obligation of an oath—this first requirement goes to his capacity as a witness at the time he is testifying; Second, and this requirement is as important, or more important than the first "*and to be capable of giving a correct account of the matters which he has seen or heard in reference to the questions at issue.*" Put otherwise, 107 U.S. 521, "* * * *nor from giving a perfectly accurate and lucid statement of what they have seen or heard*". It is nowhere challenged but that the witness Hines "has an unclear memory". Certainly, a man with an unclear memory may not meet the second requirement of "giving a correct account of the matters which he has seen or heard"—his "unclear memory clearly renders him incompetent on the second requirement." Even Wigmore, Third Edition, §494, p. 578, cited in the decision and opinion below, at page 587, states that the capacity to recollect is an essential part of the idea of testimonial qualification. Wigmore, cited by the court

below, would allow the jury not the court to determine the competency of a witness, and to winnow the chaff of nonsense and unbalance from any lucid, *remembered* matters of fact, if any, of an obviously incompetent witness, thus allowing the jury to determine matters of law, not of fact.

The court below follows Wigmore, not *Armes*. The Court below has emasculated that pre-requisite to testimonial qualification by disregarding entirely the unquestioned fact that the witness with an unclear memory, did not have the capacity to recollect, and could not give a correct or an accurate, lucid account of what he had seen or heard. This Court should grant certiorari for the first reason that the decision below is in conflict with Armes, and for the second that the decision of the court below has so muddled the issues and questions involved that it creates a federal question which has not after the opinion below, but should be decided by this Court, if only to the end that the rule in Armes be reiterated, that the courts under the supervision of this Court shall follow and not attempt to distinguish or disregard its doctrines.

Further, Rule 26 of the Federal Rules of Criminal Procedure states that "The competency * * * of witnesses shall be governed * * * by the principles of the common law as they may be interpreted by courts of the United States in the light of reason and experience. This merely states in other words the holding in *Armes, supra*, that it is a "question to be determined by the court." Here, the court of first instance, and the Court below, affirming *submitted the question of competency to the jury*. It is a denial of due

process under Amendment V of the Constitution of the United States.

Respectfully submitted,

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